Office Supreme Court, U.S.
FILED
APR 25 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1046

GEORGE WEISS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

DANIEL H. GREENBERG
Counsel for Petitioner
Office and Post Office Address
110 East 42nd Street
New York 17, New York

IN THE

Supreme Court of the United States

October Term, 1963

No.

GEORGE WEISS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner George Weiss prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on November 27, 1963.

Opinion Below

There has been no opinion written in the court below, or in any of the lower or intermediate appellate courts.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on November 27, 1963. On February 13, 1964, Mr. Justice John M. Harlan granted an order ex-

tending the time of petitioner to file his petition for a writ of certiorari to and including April 25, 1964. On February 27, 1964, the Court of Appeals granted petitioner's motion to amend the remittitur and thereupon amended the remittitur by holding that on the appeal to said court there were presented and necessarily passed upon questions under the Constitution of the United States, viz: whether § 1142-a of the Penal Law of the State of New York is unconstitutional as repugnant to the First and Fourteenth Amendments to the said Constitution, both on its face and as applied to the facts of this case and further, as violative of the equal protection clause of the Fourteenth Amendment as applied to this petitioner. Said court held that no constitutional rights of petitioner were violated. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257 (3).

Questions Presented

The following questions are presented in this case:

1. Whether § 1142-a of the Penal Law of the State of New York is unconstitutional as abridging the freedom of speech and of the press, contrary to the First Amendment of the Constitution of the United States.

2. Whether in the application of the law as embodied in § 1142-a of the Penal Law of the State of New York, to petitioner, he was denied the equal protection of the laws, in violation of Fourteenth Amendment to the Constitution of the United States.

3. Whether § 1142-a of the Penal Law of the State of New York is vague and indefinite on its face, so as to render

petitioner's prosecution violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

The statute involved in this case is § 1142-a of the Penal Law of the State of New York, which reads as follows:

> "§ 1142-a Advertisements relating to certain diseases prohibited
>
> "Whoever publishes, delivers or distributes or causes to be published, delivered or distributed in any manner whatsoever an advertisement concerning a venereal disease, lost manhood, lost vitality, impoteney, sexual weakness, seminal emissions, varicocele, self-abuse or excessive sexual indulgence whether described by such names, words, terms or phrases, or by any other names, words, terms or phrases, calculated or intended to convey to the reader the idea that any of said diseases, infirmities, disabilities, conditions, or habits are meant or referred to, and calling attention to a medicine, article or preparation that may be used therefor or to a person or persons from whom or an office or place at which information, treatment or advice relating to such disease, infirmity, habit or condition may be obtained, is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than six months, or by a fine of not less than fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment. This section, however, shall not apply to didactic or scientific treatises which do not advertise or call attention to any person or persons from whom or any office or place at which information, treatment or advice may

be obtained, nor shall it apply to advertisements or notices issued by an incorporated hospital, or by a licensed dispensary, duly certified by the local board of health as a venereal disease clinic, or by a municipal board or department of health or by the department of health of the state of New York. Added L. 1917, c. 487; amended L. 1940, c. 371, § 3, eff. April 1, 1940."

STATEMENT OF THE CASE

The Information

The information in this case was in two counts, in which the petitioner was accused of violation of Section 1142-a of the Penal Law of the State of New York, alleging in Count 1 thereof that on or about September 11, 1960 in the County of New York the petitioner did cause to be published, delivered and distributed in the Spanish Language Newspaper, *La Prensa* "an advertisement that he was a practicing physician and would be willing to treat male patients for lost vitality and lost manhood." The second count charged the same offense in the same pleading language, except that the offense was alleged to have been committed on April 2, 1961.

The Record

The record in this case before the Court of Appeals of the State of New York consisted of the complete record on appeal before the Appellate Division of the Supreme Court of the State of New York, and constituted the entire record before the former Court of Special Sessions of the City of New York. A certified copy of this record on appeal is being submitted to this Court with this case.

Federal Question Raised

The federal question raised by this case was first raised before the court of original jurisdiction, the former Court of Special Sessions of the City of New York, and said federal questions have continued to be raised before both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals of the State of New York. The petitioner's motion to amend the remittitur in this case, which was granted by the Court of Appeals, reflects that that court necessarily considered and passed upon the federal questions raised herein.

The Facts

The facts in this case insofar as they relate to the questions presented for consideration by this Court concern the advertisement printed in the Spanish Languago in the newspaper *La Prensa* on the two occasions referred to in the separate counts of the information and the written translation of this advertisement into the English Language. Exhibit 7 received in evidence (Record on Appeal, p. 80) reads as follows:

> "Consult With Dr. Weiss
>
> Stomach & Abdominal Surgeon, Rectal Postule etc., Head, Chest, Tumors, Ulcers & Glands, Womens' Diseases, Acute & Chronic Personal Problems of the Woman, Debility & Rejuvenation for the Men, Prostrate, Urinary, Cronic & Acute Affections. Plastic! —Stomach, Breasts, Nose-Rejuvenation, Operations, Wrinkles, Bags, Facial Scars, *I speak Spanish*. Moderate Fees. Personal Attention, 2 Offices! 609 W 135th St. 4 & 9 P.M. 1005 Hoe Ave. Near Simpson

Station. Evenings 7 to 9. Daily & Sundays. DA 3-5606."

The prosecution contended that this advertisement violated § 1142-a of the Penal Law; petitioner contended it did not, and contended that the advertisement contained no reference whatever to treatment for "lost vitality" or "lost manhood" and that at no time did he publish or advertise anything in connection with matters proscribed by the statute in question. Petitioner also contended that the advertisement was not correctly translated and that the newspaper itself arranged the words contrary to his advertisement rather than printing it as submitted. Petitioner also stated that the terms in the advertisement "debility" and "rejuvenation" refer to petitioner's specialized practice as a plastic surgeon and did not and was not intended to refer to any proposal for sexual surgery or treatment. It is to be pointed out that the publication of this advertisement is not a violation of any law of the State of New York or of the medical canons of ethics.

Reasons for Granting the Writ

1. The reasons for granting the writ of certiorari in this case are as follows. Section 1142-a of the Penal Law of the State of New York is unconstitutional as abridging the freedom of speech and of the press, contrary to the First Amendment of the Constitution of the United States. It is rather unfortunate that any opinion of the Courts of the State of New York was petitioner's contention, originally raised by a timely motion to dismiss the information on the ground of its federal constitutional invalidity (Record, p. 12). In the case of *People* v. *Morris*, 259 App. Div. 738,

18 N.Y. Supp. 2nd 448, the Appellate Division of another department stated without discussion "that § 1142-a is not offensive of any constitutional provision, citing *People* v. *Sanger*, 222 N.Y. 192, which itself related to a different section of the Penal Law. It is petitioner's contention that the publication of this advertisement is an exercise on his part of freedom of speech and of the press, as guaranteed by the First Amendment of the Constitution of the United States. The only case directly in point hereon is *People* v. *Levenson*, a California case reported in 183, C.A. 2d 863, which held unconstitutional a similar statute in the State of California. In that case the Court relied upon this Court's decisions *In Matter of Jackson*, 96 U.S. 727 and *Smith* v. *California*, 361 U.S. 147. The *Levenson* case was followed and approved in another case in California, *In Re Schillaci*, 196 C.A. 2d 591. It is submitted that a criminal prosecution for the publication of the advertisement involved in this case is violative of petitioner's protections and rights under the First Amendment to the Constitution of the United States.

2. Assuming *arguendo* that the statute involved herein is constitutionally valid, nevertheless its application to the facts of this case denied petitioner the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. A reading of the advertisement in the Spanish Language, and its English translation must leave one with a clear impression that petitioner did not advertise that he would or could restore "lost manhood" or "lost vitality," as denounced by this statute, or that he would perform any sexual operation of a restorative nature. The advertisement related solely and wholly to plastic surgery and to surgical procedures for the elimina-

tion of "Debility and Rejuvenation for the men." Any other interpretation flies in the face of the clear language of the advertisement. It is quite apparent that the principal objection here is to petitioner's use of the newspapers for advertising his medical services, which is frowned upon by the authorities, but which is clearly not violative of any penal statute. It is only by a tortured construction of language that a criminal charge was fashioned against this petitioner.

3. Section 1142-a of the Penal Law of the State of New York is vague and indefinite on its face, so as to render petitioner's prosecution violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The principal vice of the statute in question herein is the lack of definition of its terms. Since it is not disputed that a penal statute is to be strictly construed and the conduct proscribed thereby is to be clear and definite, the attempted construction of this statute to fit the facts of this case so as to bring it without proscribed conduct, renders the statute vague and indefinite on its face as to make it unconstitutional. This statute has never before been presented to this Court for a construction or decision as to its constitutional status.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 23 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 1046

GEORGE WEISS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
MICHAEL JUVILER
155 Leonard Street
New York, New York 10013
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
THE STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
POINT I—The applicable provision of Section 1142-a of the New York Penal Law is a valid exercise of the state's police power, and its enforcement against petitioner violated no constitutional rights	
a. The provision is a valid exercise of the state's police power	6
b. The provision does not abridge freedom of speech or press	11
c. The provision does not deprive petitioner of equal protection of the laws	15
d. The judgment of conviction was based on constitutionally sufficient evidence	17
e. Petitioner's claim of vagueness is inappropriately raised; in any case, the provision is not unconstitutionally vague	18
CONCLUSION	20

TABLE OF AUTHORITIES

PAGE

Cases:

Application of Schillaci, 16 Cal. Rptr. 757 (2nd Dist. 1961) 14

Aronberg v. FTC, 132 F. 2d 165, 167 (7th Cir. 1943) 19

Bedno v. Fast, 95 N. W. 2d 396, 399-400 (Wisc. 1959), cert. denied 360 U. S. 931 (1959) 11

Breard v. Alexandria, 341 U. S. 622 (1951) 12

Charles of the Ritz v. FTC, 143 F. 2d 676, 679 (2nd Cir. 1944) 19

Chenoweth v. Medical Examiners, 141 Pac. 132 (Col. 1913) 16

Commonwealth v. Redmond, 2 Erie 207, 13 Berks 64, 30 Pa. Dist. 479 (Pa. Dist. Co. 1920) 7, 17, 19

Davis v. Board of Regents, 307 N. Y. 786 (1954), affirming 283 App. Div. 591 (3rd Dept. 1954) 9, 13

Economy Optical Co. v. Optometric Examiners, 310 S. W. 2d 783 (1958) 13

Garner v. Louisville, 365 U. S. 157 (1961) 17

Goe v. Gifford, 191 S. E. 782 (Va. 1937) 16

Head v. Examiners in Optometry, 374 U. S. 424, 426 (1963) 8

Hirsch v. San Francisco, 300 P. 2d 177 (Cal. App. 2d Div. 1956) 13

Hughes v. Medical Examiners, 134 S. E. 42 (Ga. 1926) 7, 15, 16

Jamison v. Texas, 318 U. S. 413, 417 (1943) 12

Jasnowski v. Connolly, 158 S. W. 229, 230 (Mich. 1916) 19

Jordan v. De George, 341 U. S. 223, 231-232 (1951) 20

PAGE

Levine v. State Board, 1 A. 2d 876 (N. J. 1938) 13
Lovell v. Griffin, 303 U. S. 444 (1938) 12

Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962) 7
Murdock v. Pennsylvania, 319 U. S. 105, 110, 111 (1943) 12

Near v. Minnesota, 283 U. S. 697 (1931) 14

Oshins v. York, 8 So. 2d 670 (Fla. 1942) 13, 16

People v. Arlen Service Stations, 284 N. Y. 340, 345 (1940) 16
People v. Byrnes, 190 P. 2d 584, 588 (Colo. 1948) 19
People v. Fritch, 13 N. Y. 2d 119 (1963) 7
People v. Kennedy, 142 N. W. 770 (Mich. 1913) 7, 17, 19
People v. LaRollo, 24 N. Y. S. 2d 350 (N. Y. C. Mag. 1940) 13
People v. Levenson, 8 Cal. Rptr. 734 (App. Dept., Co. Ct. 1960) 14
People v. Minjac, 4 N. Y. 2d 320, 323 (1958) 19
People v. Sanger, 222 N. Y. 192 (1918), error dismissed 251 U. S. 537 (1919) 10, 15
People v. Weiss, 13 N. Y. 2d 1052 (1963), remittitur amended —— N. Y. 2d ——, N. Y. L. Journ. Mar. 2, 1964, p. 15, col. 3 1, 2, 5
People v. Windsor Madison Corp., 173 N. Y. S. 2d 964 (N. Y. C. Mag. 1958) 13
Perlow v. Dental Examiners, 127 N. E. 2d 306 (Mass. 1955) 16
Pittsford v. Los Angeles, 122 P. 2d 535 (Cal. App. 1st Div. 1942) 13
P. Lorillard Co. v. FTC, 186 F. 2d 52, 58 (4th Cir. 1950) 19
Pollack v. Public Utilities Commission, 191 F. 2d 450, 457 (D. C. Cir. 1951), rev'd on other grounds 343 U. S. 451 (1952) 12

PAGE

Roth v. United States, 354 U. S. 476 (1957) 7

Semler v. Dental Examiners, 294 U. S. 608, 612 (1934) 8, 9, 10, 11

Sherman v. Dental Examiners, 116 S. W. 2d 843 (Tex. Civ. App. 1938) 13, 16

Smith v. California, 361 U. S. 147 (1959) 14

State v. Gitelman, 21 N. W. 2d 198 (Minn. 1945) 13

State v. Hobson, 83 A. 2d 846 (Del. 1951) 13

State v. Hollinshead, 151 Pac. 710 (Ore. 1915) 7, 10, 15, 16

Thompson v. Louisville, 362 U. S. 199 (1960) 17

Ullom v. Boehm, 142 A. 2d 19 (Pa. 1958) 13

United Advertising Corp. v. Raritan, 93 A. 2d 362 (N. J. 1952) 13

Valentine v. Chrestenson, 316 U. S. 52 (1941) 12

Weiss v. Board of Regents, 284 App. Div. 1005 (3rd Dept. 1954), appeal dismissed 308 N. Y. 810 (1955) 9

Williams v. Mayor of Baltimore, 289 U. S. 36, 42 (1933) 11

Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 490 (1955) 9, 11, 15, 16

Statutes:

Ala. Code tit. 22, §276 6

Ark. Stat. Ann. §82-1118 6, 10

Cal. Bus. & Prof. Code:

§600 6

§2382 8

Col. Rev. Stat. Ann. §§40-9-26, 40-9-27 6, 10

Col. Rev. Stat. §§91-1-28, 91-1-29 6

	PAGE
CONN. GEN. STAT. ANN. §19-233	7–8, 10
HAW. REV. L. §51-19(b)	7, 10
IA. CODE ANN. §725.7	7
IDAHO CODE ANN. §39-701	7
MASS. ANN. L. ch. 272, §29	7
ME. REV. STAT. ch. 134, §26	7, 10
MICH. STAT. ANN. §28.223	7
MINN. STAT. ANN.:	
§147.02	8
§617.28	7, 10
MONT. REV. CODE §94-3611	7, 10
N. DAK. REV. CODE §23-12-05	7
NEB. REV. STAT. §28-923	7
N. MEX. STAT. §67-5-9	8
N. Y. EDUC. L.:	
§6513	8
§6514(2)(d)	6, 13
N. Y. PENAL L.:	
§421	5
§1141	6
§1142-a	2, 3, 7, 20
§1143	6
§1145	6
OKLA. STAT. ANN. §59-509	8
ORE. REV. STAT.:	
§434.250, 434.260	7
§677.190(11)	8
PA. STAT. ANN. tit. 18:	
§4526	7
§4531	7, 10

PAGE

S. Dak. Code §13.1508 7

Tex. Penal Code arts. 702, 703 7

Utah Code Ann.:
§26-6-43 7
§58-12-18(4) 8

Va. Code §32-103 7
Vt. Stat. Ann. tit. 13, §§305-307 7

Wash. Rev. Code Ann. §§9.04.030, 69.04.720 ..... 7, 10
W. Va. Code §1319 7
Wis. Stat. Ann.:
§143.075 7
§147-20(1)(b) 8
Wyo. Stat. §35-180-182 7

Other Authorities:

1921 Op. N. Y. Atty Gen. 302 8

IN THE

Supreme Court of the United States

October Term, 1963

No. 1046

GEORGE WEISS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review a judgment of that court rendered, without opinion, on November 27, 1963 [*People* v. *Weiss*, 13 N.Y. 2d 1052], affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, rendered April 11, 1963 (268-72),* which unanimously affirmed, without opinion, a judgment of the Court of Special Sessions [now Criminal Court] of

* References, unless otherwise indicated, are to folios of the printed record on appeal to the New York Court of Appeals.

the City of New York rendered May 25, 1962, convicting petitioner, after trial, of the crime of publishing advertisements relating to certain diseases (10-14, 190) [N.Y. PENAL LAW §1142-a], and sentencing him to a fine of $250 or thirty days' imprisonment (200). On February 27, 1964, the New York Court of Appeals amended the remittitur to show that the court had necessarily passed upon questions under the Constitution of the United States [—— N.Y. 2d ——, N.Y.L. JOUR. Mar. 2, 1964, p. 15, col. 3].

The information on which petitioner was convicted alleged that he caused to be published in the newspaper *La Prensa* an advertisement representing that he would treat male patients for lost vitality and lost manhood (10-14). [N.Y. PENAL LAW §1142-a].

Questions Presented

1. Is a penal statute prohibiting advertisements of treatment for "lost manhood," "lost vitality," or other impotency within the state police power?

2. Does such a statute abridge the freedoms of speech and press?

3. Did the application of the statute to petitioner in the instant case deprive him of equal protection of the laws?

4. Is the judgment of conviction supported by constitutionally sufficient evidence?

5. Is petitioner's claim of vagueness properly raised? If so, is the statute unconstitutionally vague?

The Statute Involved

New York Penal Law §1142-a. Advertisements relating to certain diseases prohibited:

"Whoever publishes, delivers or distributes or causes to be published, delivered or distributed in any manner whatsoever an advertisement concerning a venereal disease, lost manhood, lost vitality, impotency, sexual weakness, seminal emissions, varicocele, self-abuse or excessive sexual indulgence whether described by such names, words, terms or phrases, or by any other names, words, terms or phrases, calculated or intended to convey to the reader the idea that any of said diseases, infirmities, disabilities, conditions, or habits are meant or referred to, and calling attention to a medicine, article or preparation that may be used therefore or to a person or persons from whom or an office or place at which information, treatment or advice relating to such disease, infirmity, habit or condition may be obtained, is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than six months, or by a fine of not less than fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment. This section, however, shall not apply to didactic or scientific treatises which do not advertise or call attention to any person or persons from whom or any office or place at which information, treatment or advice may be obtained, nor shall it apply to advertisements or notices issued by an incorporated hospital or by a licensed dispensary duly certified by the local board of health as a veneral disease clinic, or by a municipal board or department of health or by the department of health of the state of New York."

Statement of the Case

On September 11, 1960, and April 2, 1961, at petitioner's instigation, an advertisement appeared in New York City in the Spanish-language newspaper *La Prensa*, representing that "Dr. Weiss," an "abdominal surgeon," would give "debility and rejuvenation" treatment to men (69; Exs. 2, 3, 7). Translated into English, the advertisement was as follows:

> "Consult DR. WEISS—Stomach and abdominal surgeon—Rectal Postule, etc. Head * Chest * Tumors * Ulcers and Glands * Women's Diseases, Acute and Chronic. Personal problems of the woman **Debility and Rejuvenation for the men * Prostate, Urinary, Chronic and Acute Affections * Plastic—Stomach—Breasts — Nose — Rejuvenation, Operations, Wrinkles, Bags, Facial Scars. I SPEAK SPANISH. Moderate Fees, Personal Attention, 2 offices: 609 W. 135 St. 4 & 6 P.M.; 1005 Hoe Ave. near Simpson Station, evenings 7 to 9. Daily and Sundays. DA 3-5606" (69; Exs. 2, 4, 7).

Petitioner was subsequently charged with the misdemeanor of violating Section 1142-a of the New York Penal Law, which prohibits, except under particular circumstances, advertisements relating to certain diseases; the specific provisions charged concerned advertisements for treatment of "lost manhood" or "lost vitality" (10-14). At trial, before three judges of the Court of Special Sessions [now Criminal Court] of New York City, petitioner contended that the phrase "debility and rejuvenation" in the advertisement referred only to plastic surgery for men and women (145, 148-9, 174). He also asserted that the

statute was unconstitutional, since it was outmoded, and discriminatory (35-7). Petitioner was convicted of both counts, and was sentenced to a fine of $250, or thirty days' imprisonment (190, 200).

The conviction was upheld by the Appellate Division, First Department, of the New York Supreme Court, and by the New York Court of Appeals. The latter court, in amending the remittitur, indicated that it had passed upon and rejected petitioner's claims that the statute, as applied, deprived him of freedom of speech and equal protection of the laws [*People* v. *Weiss*, 13 N.Y.2d 1052 (1963), *remittitur amended* —— N.Y.2d ——, N.Y.L. Journ. Mar. 2, 1964, p. 15, col. 3 (1964)].

POINT I

The applicable provision of Section 1142-a of the New York Penal Law is a valid exercise of the state's police power, and its enforcement against petitioner violated no constitutional rights [answering the petition].

The questions presented, while unusual, involve a statute that expresses significant public policies: preserving professional dignity, and protecting the gullible public. Section 1142-a of the New York Penal Law imposes criminal penalties for publishing advertisements respecting treatment of "lost manhood," impotency, or other specified sexual conditions. Untruth and deception are not elements of the crime, as they are under the general false advertising statute [N.Y. Penal L. §421]. See

tion 1142-a requires no proof of obscenity, in contrast with other penal provisions [N.Y. Penal L. §§1141, 1143]. Unlike the state Education Law, which prohibits licensed physicians from advertising for any type of patronage, on penalty of suspension or revocation of the license [N.Y. Educ. L. §6514(2)(d)], the statute covers only advertising of treatment for specified sexual diseases. Thus, in the context of these other statutes, the distinctive feature of Section 1142-a is the designation for criminal sanction of certain narrowly defined advertisements in the field of health. The state's power to enforce such a law would appear unassailable, but petitioner attacks the constitutionality of the statute on several fronts. None of his cannonades hits the mark.

a. The provision is a valid exercise of the state's police power.

Construing petitioner's claims as liberally as possible, one of his contentions is that the statute, in prohibiting certain publications without proof of bad faith, falsity, or obscenity, is arbitrary and unreasonable, and therefore deprives petitioner of liberty and property without due process. The statute, however, is firmly supported by reason and authority.

Recognizing the evils aimed at by Section 1142-a, at least twenty-three other states have enacted criminal statutes prohibiting the advertising of treatment for "lost manhood," "lost vitality," "impotency," or "sexual weakness" [Ala. Code tit. 22, §276; Ark. Stat. Ann. §82-1118; Cal. Bus. & Prof. Code §600; Col. Rev. Stat. Ann. §§40-9-26, 40-9-27, 91-1-28, 91-1-29; Conn. Gen. Stat. Ann. §19-

233; Haw. Rev. L. §51-19 (b); Idaho Code Ann. §39-701; Me. Rev. Stat. ch. 134, §26; Mich. Stat. Ann. §28.223; Minn. Stat. Ann. §617.28; Mont. Rev. Code §94-3611; No. Dak. Rev. Code §23-12-05; Ore. Rev. Stat. §§434.250, 434.260; Pa. Stat. Ann. tit. 18, §4531; So. Dak. Code §13.1508; Tex. Penal Code arts. 702, 703; Utah Code Ann. §26-6-43; Vt. Stat. Ann. tit. 13, §§305-307; Va. Code §32-103; Wash. Rev. Code Ann. §§9.04.030, 69.04.720; W. Va. Code §1319; Wis. Stat. Ann. §143.075; Wyo. Stat. §35-180-182]. These laws have been declared reasonable police regulations [*People* v. *Kennedy*, 142 N. W. 770 (Mich. 1913); *State* v. *Hollinshead*, 151 Pac. 710 (Ore. 1915)]. Penal laws forbidding advertisements for treatment of "diseases of the sexual organs," or "private diseases," have also been enacted [Ia. Code Ann. §725.7; Mass. Ann. L. ch. 272, §29; Neb. Rev. Stat. §28-923; Pa. Stat. Ann. tit. 18, §4526], and held valid [*Commonwealth* v. *Redmond*, 2 Erie 207, 13 Berks 64, 30 Pa. Dist. 479 (Pa. Dist. Ct. 1920); see *Hughes* v. *Medical Examiners*, 134 S. E. 42 (Ga. 1926)].

The validity of Section 1142-a as an exercise of the police power is further confirmed by a detailed examination of its purposes. Although the statute is contained in the article of the New York Penal Law that contains the state's obscenity law [N.Y. Penal L. Art. 106, §§1140-1148], obscenity in the constitutional sense [see *Roth* v. *United States*, 354 U. S. 476 (1957); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962); *People* v. *Fritch*, 13 N. Y. 2d 119 (1963)] is not the target, as is clear from the broad statutory exemptions for public advertising by certain institutions [N.Y. Penal L. §1142-a, '145; see 1921 Op. N.Y.

Atty. Gen. 382]. Section 1142-a is primarily a public health regulation. Indeed, in the great majority of states that have enacted such a statute, the law is found in the health code alone (Ala., Ark., Cal., Conn., Haw., Idaho, No. Dak., Ore., Utah, Va., W. Va., Wis., Wyo.); in both the health code and penal law (Col., Wash.), or in the "health" section of the penal law (So. Dak., Tex.). Moreover, statutes in several states provide that a licensed physician placing advertisements relating to treatment for "lost manhood," "lost vitality," "impotency," or "sexual weakness" is guilty of "unprofessional conduct," and liable to disciplinary action [CAL. BUS. & PROF. CODE (2382); MINN. STAT. ANN. (147.02; N. MEX. STAT. (67-5-9; OKLA. STAT. ANN. 59-509; ORE. REV. STAT. (677.190(11); UTAH CODE ANN. 58-12-18(4); WIS. STAT. ANN. (147-20(1)(b)]. Plainly, the equivalent prohibition in the New York Penal Law also is concerned with the public health.

One of the specific statutory functions is to prevent commercialization of the healing arts. Since treatment of any disease is forbidden except by licensed physicians [N.Y. Educ. L. (6512)], Section 1142-a concerns mainly doctors. The statute is typical of restrictions on health advertising that are designed to "assure high standards of professional competence" [see *Head v. Examiners in Optometry*, 374 U. S. 424, 426 (1963)], and discourage "practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry" [see *Semler v. Dental Examiners*, 294 U. S. 608, 612 (1934)]. Of course, the same policies are involved when Section 1142-a is enforced against advertisements by laymen.

The power of the state to prevent such commercialization by prohibiting advertising concerning treatment for certain sexual diseases is beyond question. To secure high standards in the healing arts, the state may forbid all advertising by physicians, regardless of subject matter. Indeed, one of the leading New York cases on this point involved advertising for patronage, in Spanish-language magazines, by this petitioner [*Weiss v. Board of Regents*, 284 App. Div. 1095 (3rd Dept. 1954), *appeal dismissed* 308 N. Y. 810 (1955); see also *David v. Board of Regents*, 307 N. Y. 786 (1954), *affirming* 283 App. Div. 591 (3rd Dept. 1954)]. A state may restrict advertising by dentists [*Semler v. Dental Examiners, supra*]. Nor is there any "constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should not use merchandising methods for obtaining customers" [*Williamson v. Lee Optical of Oklahoma, Inc.* 348 U. S. 483, 490 (1955)]. Similarly, a state may reasonably conclude, as half of the states have, that the danger of unseemly commercialization is especially great in the area of sexual health, where promises of relief are particularly alluring.

The special attraction of such advertisements points to another purpose of Section 1142-a: "protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief" [see *Semler v. Dental Examiners, supra*, at 612]. Claims of treatment of impotency, like the claims of "painless" dentistry that were involved in the *Semler* case, are prima facie improbable. In several states, advertisements are expressly deemed false by statute, if they claim a beneficial

effect on sexual impotence [ARK. STAT. ANN. §82-1118; CONN. GEN. STAT. ANN. §19-233; HAW. REV. L. §51-19(b); WASH. REV. CODE ANN. §§9.04.030, 69.04.720]. Another sharp practice aimed at is "bait advertising." As was said in *Semler*,

> "'[I]t could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislation was aimed at 'bait advertising.' 'Inducing patronage,' said the [highest State] court, 'by representations of "painless dentistry," "professional superiority," "free exams," and "guaranteed" dental work,' was, as a general rule, 'the practice of the charlatan and the quack' to entice the public.
>
> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them" [294 U. S. 608, 611-612].

Section 1142-a also represents a third valid purpose of the state police power, protection of the public morals [see *People* v. *Sanger*, 222 N. Y. 192 (1918), *error dismissed* 251 U. S. 537 (1919); *State* v. *Hollinshead*, 151 Pac. 710 (Ore. 1915)]. As an indication of this policy, the statute is part of the "indecency" article of the New York Penal Law, as is also the case in several other states [COL. REV. STAT. ANN. §§40-9-26, 40-9-27; ME. REV. STAT. ch. 134, §26; MINN. STAT. ANN. §617.28; MONT. REV. CODE §94-3611; PA. STAT. ANN. tit. 18, §4531]. Unquestionably, the legislature may validly determine that hawking of potency treatments is harmful to the public morality [see *People* v. *Sanger*, *supra*; *State* v. *Hollinshead*, *supra*]. While reasonable men

may differ as to the wisdom of the statute in this respect. "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful" [*Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, 42 (1933)].

It follows from these principles that the statute need not distinguish between truthful and fraudulent advertisements in a particular case. In framing its policies, particularly in the "vital interest of public health," the legislature is

> "entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement" [*Semler* v. *Dental Examiners*, *supra* at 612-613; *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487-488 (1955); *Bedno* v. *Fast*, 95 N. W. 2d 396, 399-400 (Wisc. 1959), *cert. denied* 360 U. S. 931 (1959)].

b. The provision does not abridge freedom of speech or press.

Notwithstanding the many reasonable exceptions to the statute, petitioner claims that the law restricts the publication of legitimate medical information, and therefore abridges his freedom of speech and freedom of the press. His claim is apparently based on the absence of untruth or obscenity as elements of the crime.

Petitioner's argument stems from a misunderstanding of the effect of the statute, and the meaning of the First

Amendment. Section 1142-a applies only to "advertisements," not to the giving of advice by a physician, the discussion of medical ideas, or scientific publications. The law does not apply to advertisements by incorporated hospitals, licensed venereal disease clinics, or public health agencies. In short, the area of coverage is essentially commercial advertising, and such was the application in the instant case. It is well settled that where, as here, political, religious, literary, economic or scientific "ideas" are not involved, advertising may be subject to reasonable restraints in the interest of public heath, safety and morals, without violating the First Amendment.

In *Valentine* v. *Chrestenson* [316 U. S. 52 (1941)], this Court held that a provision forbidding distribution of business advertising matter on a street or in a public place was not an abridgment of freedom of speech or freedom of the press, since these guarantees impose no restraint on reasonable regulation of commercial advertising. This principle has been approved in other street advertising cases [*Murdock* v. *Pennsylvania*, 319 U. S. 105, 110, 111 (1943); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943); see *Lovell* v. *Griffin*, 303 U. S. 444 (1938)]. *Breard* v. *Alexandria* [341 U. S. 622 (1951)] held that an ordinance forbidding solicitation of orders at private residences without prior consent of the occupant, enforced against sellers of subscriptions for national magazines, was not an abridgment of freedom of speech. Again, the Court stressed the commercial feature of the solicitation. Similarly, *Pollack* v. *Public Utilities Commission* [191 F. 2d 450, 457 (D. C. Cir. 1951), *rev'd on other grounds* 343 U. S. 451 (1952)], held that a municipality may forbid radio commercials and an-

nouncements on public buses, since the First Amendment "does not protect commercial advertising." This Court reversed only because it disagreed with the lower court's view that "forced listening" was a deprivation of due process; the other ruling was undisturbed.

Decisions in New York are consistent with these federal cases [see *Davis* v. *Board of Regents*, 307 N. Y. 786 (1954), *affirming* 283 App. Div. 591 (3rd Dept. 1954); *People* v. *Windsor Madison Corp.*, 173 N. Y. S. 2d 964 (N. Y. C. Mag. 1958); *People* v. *LaRollo*, 24 N. Y. S. 2d 350 (N. Y. C. Mag. 1940)]. In *Davis*, the Court of Appeals rejected the argument of a physician whose license was suspended because he advertised for patronage [see N. Y. Educ. L. §6514(2)(d)] that this action violated his freedom of speech.

In other states as well, arguments comparable to defendant's have been rejected, in decisions involving restrictions on dental advertising [*Levine* v. *State Board*, 1 A. 2d 876 (N. J. 1938); *Sherman* v. *Dental Examiners*, 116 S. W. 2d 843 (Tex. Civ. App. 1938); *Oshins* v. *York*, 8 So. 2d 670 (Fla. 1942)]; advertising of optical products or prices [*Ullom* v. *Boehm*, 142 A. 2d 19 (Pa. 1958); *Economy Optical Co.* v. *Optometric Examiners*, 310 S. W. 2d 783 (1958)]; billboard advertising [*United Advertising Corp.* v. *Raritan*, 93 A. 2d 362 (N. J. 1952)]; distribution of commercial advertising on streets [*Pittsford* v. *Los Angeles*, 122 P. 2d 535 (Cal. App. 1st Div. 1942)]; advertising of gasoline prices [*State* v. *Hodson*, 83 A. 2d 846 (Del. 1951)]; and "audible solicitation" on the street [*Hirsch* v. *San Francisco*, 300 P. 2d 177 (Cal. App. 2nd Div. 1956)].

Since there was no proof in any of these federal and state cases that the advertisement in question was untruthful or indecent, there is no merit to petitioner's assumption that any printed matter that is not proved false or obscene is protected by the First Amendment. Further refutation of petitioner's false assumption is its unreasonable consequences: disastrous restrictions on the state's power to regulate professional and commercial conduct in the public interest.

This discussion compels disapproval of the cases relied upon by petitioner, *Application of Schillaci* [16 Cal. Rptr. 757 (2nd Dist. 1961)] and *People* v. *Levenson* [18 Cal. Rptr. 734 (App. Dept. Co. Ct. 1960)], in which intermediate appellate courts of California held, for the reasons herein refuted, that a statute comparable to Section 1142-a violated the First Amendment. Significantly, none of the cases referred to above was cited in these opinions.

It may also be noted that the California statute apparently had a censorship feature that is absent from the New York law. As the courts seemed to have construed the California statute, it required prior approval by a board of health of any advertisement by a hospital or agency with the specified subject-matter. This suggestion of "previous restraint" [see *Near* v. *Minnesota*, 283 U. S. 697 (1931)], which troubled the California courts, is not found in the New York statute. In any event, the provision in question was not involved in the instant case.

Smith v. *California* [361 U. S. 147 (1959)], also cited by petitioner, has no bearing here. *Smith* concerned a

statute's inhibitory effects on the distribution of books, not medical advertising, and carried no suggestion of an analogy between the two.

c. The provision does not deprive petitioner of equal protection of the laws.

Pointing to the statutory exceptions, petitioner asserted before the New York Court of Appeals that the law arbitrarily discriminates against physicians, and in favor of private hospitals and other institutions, thereby denying him equal protection of the laws. The identical claim has been properly rejected in another state [*State* v. *Hollinshead*, 151 Pac. 710 (Ore. 1915); see *Hughes* v. *Medical Examiners*, 134 S. E. 42 (Ga. 1926)]. The aforementioned purposes of the law further confirm the validity of the statutory exemptions. The legislature could reasonably conclude that the dangers of commercialization, fraud and unseemliness, present if doctors advertise in the manner prescribed, are absent in the case of bona fide hospitals and public agencies. In fact, while the statute would have little meaning if doctors were exempted, the provision might be questioned on constitutional grounds if hospitals and public agencies were included [see *People* v. *Sanger*, 222 N. Y. 192 (1918), *error dismissed* 251 U. S. 537 (1919)].

In *Williamson* v. *Lee Optical of Oklahoma, Inc.* [348 U. S. 483 (1955)], the Supreme Court upheld a statute that outlawed advertising of eye examinations and optical appliances, and prohibited opticians from fitting or duplicating lenses without a prescription, although the law completely exempted sellers of ready-to-wear eyeglasses. The Court's opinion easily disposes of petitioner's contention:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think * * *. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind * * *. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination" [*id.* at 489; see *People v. Arlen Service Stations*, 284 N. Y. 340, 345 (1940)].

The claim that a statute regulating only certain advertising in a field denies equal protection has been rejected in other areas as well: advertising by doctors respecting diseases of the sexual organs [*Hughes* v. *Medical Examiners*, *supra*]; advertising of dental prices and appliances [*Sherman* v. *State Board*, 116 S. W. 2d 843 (Tex. Civ. App. 1938); *Gee* v. *Gifford*, 191 S. E. 783 (Va. 1937); *Oshins* v. *York*, 8 So. 2d 670 (Fla. 1942); *Perlow* v. *Dental Examiners*, 127 N. E. 2d 306 (Mass. 1955)]; advertising of gasoline prices [*People* v. *Arlen Service Stations*, *supra*]; and, as was noted above, the advertising involved in the instant case [*State* v. *Hollinshead*, *supra*]. *Chenoweth* v. *Medical Examiners* [141 Pac. 132 (Col. 1913)] reached a different conclusion with respect to a statute prohibiting doctors from publishing advertisements relative to sexual diseases, but that case is totally inconsistent with these newer, persuasive, authorities.

Petitioner baldly alleges, without citing evidence, that the instant prosecution denied him equal protection because it was "fashioned" by a "tortured construction of lan-

guage," motivated by official disapproval of the advertising of medical services (petition, pp. 6-7). The connection between the constitutional protection and the situation he alleges is unexplained. The construction of his advertisement and the statute was a matter for the state courts alone, and involves no federal questions.

d. The judgment of conviction was based on constitutionally sufficient evidence.

Petitioner's latter argument may be interpreted as a federal constitutional claim of conviction totally without evidentiary support [see *Garner* v. *Louisville*, 365 U. S. 157 (1961); *Thompson* v. *Louisville*, 362 U. S. 199 (1960)]. But there was ample proof that petitioner's advertisement came within the statutory proscription against referring to treatment for lost manhood or lost vitality. The precise phrase "lost manhood" or "lost vitality" need not appear in an advertisement to sustain a conviction under Section 1142-a. The statute, as its language makes clear, assumes attempts at evasion by the use of other words conveying the same meaning.

> "[Defendant] carefully avoided the use of the words 'lost manhood,' 'lost vitality and vigor,' but [he] used words and phrases that are just as effective and as well understood as the words mentioned in the statute * * *. 'The law cannot be evaded by intermingling other material, whether for the purpose of evasion or of securing attention to the main subject-matter, so long as the principal resulting effect is the circulation of this [forbidden matter]' " [*People* v. *Kennedy*, 142 N. W. 770, 775-776 (Mich. 1913); *Commonwealth* v. *Redmond*, 2 Erie 207, 13 Berks 64, 30 Pa. Dist. 470 (Pa. Dist. Ct. 1920)].

In the instant advertisement, the phrase "debility and rejuvenation for the men" conveys the forbidden meaning. "Debility" means weakness or infirmity, "rejuvenation" means rendering youthful again, or reinvigoration. Obviously, these words, in certain contexts, refer to lost vitality or lost manhood. While in plastic surgery the words may have an innocent meaning (163), in other contexts they may have a sexual connotation, referring to the restoration of sexual powers (165-8, 172-3). If "an individual who was impotent is relieved or cured, then it can be called rejuvenation" (172). These facts were acknowledged by petitioner's expert witness, but are plain even without expert testimony.

The meaning of the words "debility and rejuvenation for the men" also depends on their context in the advertisement, just as the meaning of the phrase "lost vitality" in the statute is derived from its context in the provision. The most immediate feature of the advertisement is a photograph of an intensely virile man (Exs. 2, 3). The phrase "debility and rejuvenation for the men" appears immediately after, and contrasts with, a list of services exclusively for women; the impression thus conveyed is that "debility and rejuvenation for men" refers to treatments peculiar to men, not to general plastic surgery. Indeed, "rejuvenation" in the sense of plastic surgery is actually spelled out separately elsewhere in the advertisement, in a list of "plastic" treatments; clearly, a different meaning is conveyed the first time the word appears. Moreover, the phrase that follows the reference to "rejuvenation and debility for the men" concerns "prostate" and other ailments of the urino-genital system, thereby strengthening the im-

pression that Dr. Weiss can treat men for sexual problems. These facts refuted petitioner's contention at trial that "debility and rejuvenation," in the advertisement taken as a whole, referred merely to plastic surgery for men and women (145, 148-9).

The conclusion to the contrary presented by petitioner's medical witness (174) was entitled to no weight, since this witness's interpretation of the advertisement was overcome by the facts reviewed above. Furthermore, the interpretation of the advertisement was for the court, not for an expert. In prosecutions for prohibited advertising, whether the advertisement falls within the statute depends upon its net impression on the public [*People v. Mingus*, 4 N. Y. 2d 320, 323 (1958); *State v. Gitelman*, 21 N. W. 2d 198 (Minn. 1945); see *Aronberg v. FTC*, 132 F. 2d 165, 167 (7th Cir. 1943); *Charles of the Ritz v. FTC*, 143 F. 2d 676, 679 (2nd Cir. 1944); *P. Lorillard Co. v. FTC*, 186 F. 2d 52, 58 (4th Cir. 1950)]—in this case, the "reader" [N. Y. Penal L. 1142-a]. This impression is an issue for the trier of fact alone. [*People v. Kennedy*, *supra*; *Commonwealth v. Redmond*, *supra*; *see People v. Barnes*, 190 P. 2d 584, 588 (Colo. 1948); *Jasmonski v. Connolly*, 158 N. W. 229, 230 (Mich. 1916)].

e. Petitioner's claim of vagueness is inappropriately raised; in any case, the provision is not unconstitutionally vague.

Petitioner's final claim is undue vagueness in statutory language. This claim is absent from all of the proceedings in the state courts, and is therefore improperly raised on the petition. Further, it is incorrect on the merits. Peti

tioner specifies no phrase in the statute; presumably, he refers to the core of the provision that was applied in the instant case, "lost manhood [or] lost vitality" (12, 14) [N. Y. PENAL L. §1142-a]. These terms, in their unambiguous statutory context—"venereal disease * * * impotency, sexual weakness"—take on a clear sexual meaning, and therefore convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" [see *Jordan* v. *De George*, 341 U. S. 223, 231-232 (1951)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
MICHAEL JUVILER
Assistant District Attorneys
Of Counsel

May, 1964